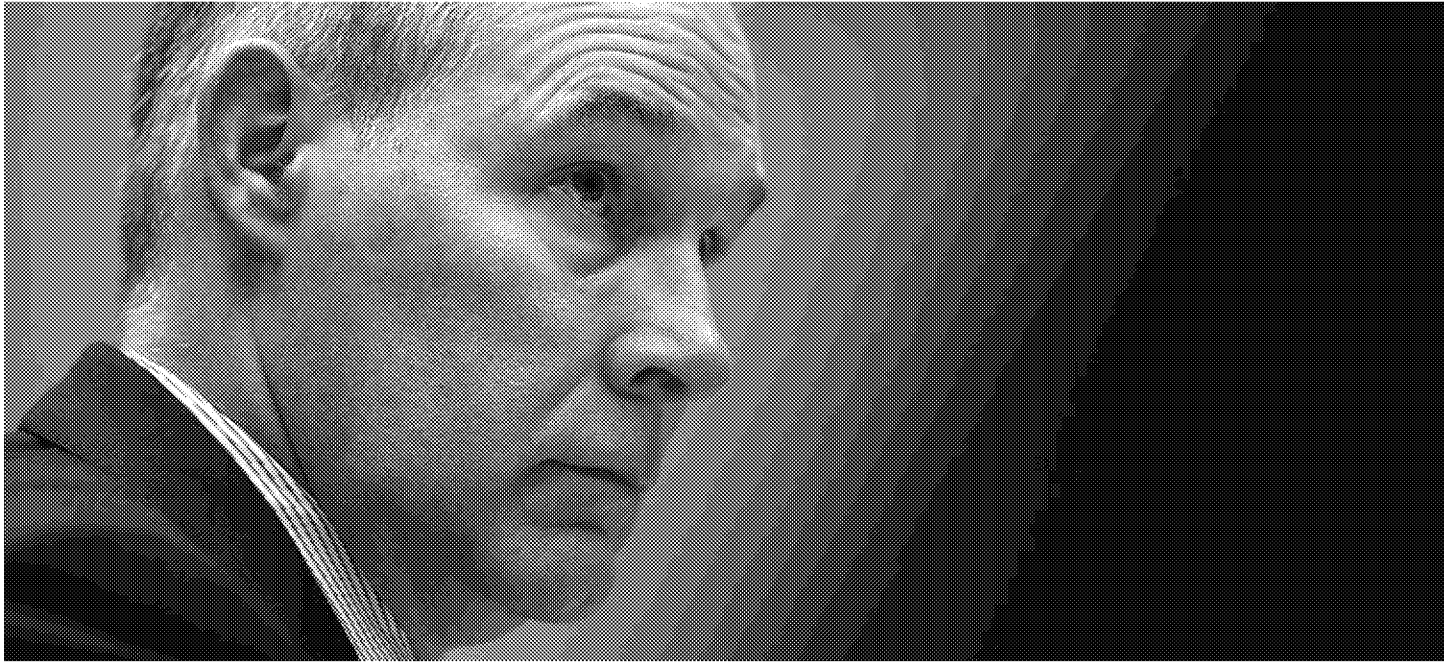


## Message

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**From:** Benforado, Jay [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E3ADEEE7EFCE4889992919103F16E006-BENFORADO, JAY]  
**Sent:** 4/30/2018 2:17:52 PM  
**To:** Sinks, Tom [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=001007b7d256453a8a19b91df704e22c-Sinks, Tom]  
**Subject:** in case you hadn't seen this NEXTGOV article

## Scott Pruitt's New Rule Could Completely Transform the EPA



Environmental Protection Agency Administrator Scott Pruitt. ALEX BRANDON/AP

By ROBINSON MEYER,  
The Atlantic  
| April 27, 2018

It would not only undermine 30 years of clean-air regulations, but radically restrict what science the agency is allowed to use.

- In one sweeping move, the Trump administration may soon not only destabilize the last three decades of clean air and water rules, but also completely overhaul how the Environmental Protection Agency uses science in its work. If EPA administrator Scott Pruitt's recently-proposed rule gets enacted, it will spark a revolution in environmental regulation. But the question is—will it stand up in court? Pruitt proposed the regulation on Tuesday, describing it as an effort to increase transparency. It would require the EPA to publish all the underlying scientific data used to support studies which guide clean-air and clean-water rules. It would forbid the use of studies that do not meet this standard, even if they have been peer-reviewed or replicated elsewhere.

Crucially, the proposed rule does not carve out an exemption for medical data, which is tightly regulated by federal law. As such, it could immediately disqualify many historic or long-running studies—especially those documenting the dangers of pesticides or air pollution—as the researchers who ran those studies never secured their subjects' permission to openly reveal their medical data. Under federal law, scientists can face criminal penalties if they publish confidential medical information about someone without first securing their permission.

Both environmental groups and anti-regulation activists said the rule would utterly transform the EPA's mission in ways that would outlast this administration. The proposal "may be the most consequential decision made by EPA since the

election of Donald Trump,” said Joseph Bast, the director of the Heartland Institute, a conservative think tank that rejects the mainstream scientific consensus about climate change, in a statement.

“The science that we use is going to be transparent, it’s going to be reproducible,” Pruitt said after signing the proposal. “It’s going to be able to be analyzed by those in the marketplace, and those that watch what we do can make informed decisions about whether we’ve drawn the proper conclusions or not.”

“This is not a policy. This is not a memo. This is a proposed rule,” he added, implying that future administrations will not be able to reverse the measure once it is finalized. Before it becomes a rule though, it’s likely to become a lawsuit—numerous environmental groups have already promised to fight the rule in court. And the way its written, many say, makes it unlikely to stand up to such scrutiny.

To support the measure, the EPA cites a large, nonpartisan literature of recommendations about science in government. An agency statement bragged that the rule “is consistent with” two bipartisan reports in particular: one from the Administrative Conference of the United States, and one from the Bipartisan Policy Center.

Wendy Wagner, a law professor at the University of Texas, knows both of those reports well. In fact, she wrote them. Wagner was the sole author of the Administrative Conference report, and she served on the seven-author panel that produced the Bipartisan Policy Center’s recommendations.

She said the proposed rule had nothing to do with her and her colleagues’ work.

“I really don’t know what the problem is that they think they’re fixing,” she said, adding that many of her co-authors “would laugh and hoot” at some of the scientific ideas expressed in the rule.

“They don’t adopt any of our recommendations, and they go in a direction that’s completely opposite, completely different,” she told me after reading the rule. “They don’t adopt any of the recommendations of any of the sources they cite. I’m not sure why they cited them.”

Other legal scholars were unsparing in their criticism of the rule. “There’s so many different issues with it that it’s hard to know where to begin,” said Sean Hecht, a professor of environmental law and policy at UCLA. “Reading the rule, it doesn’t look like a proposal that has been strongly vetted by career lawyers.”

“To anyone who’s looked at a lot of EPA rules, this rulemaking is extraordinary in the lack of reference to any legal authority,” he said.

Betsy Southerland, a former director in the EPA’s Office of Water and a 30-year veteran of the agency, told me that the rule did not legally seem like a rule at all. At one point, the agency asks the public to comment on which Congressional laws give it the greatest authority to issue the rule. “That’s a stunner,” she said.

“The proposed rule is very sloppily drafted, to be sure,” said Wagner. “It’s very hard to know what they’re talking about, why they’re doing it, how they’re doing it, why and where they see it applying—it’s very mysterious. As a legal matter, that’s not going to help.”

The new rule also appears to invent entirely new terms in environmental law. One phrase—“pivotal regulatory science”—frequently appears throughout the proposed rule. The term seems to be completely novel: It does not appear anywhere else in the laws, rules, or court decisions that govern the EPA, Hecht said. According to Google, that exact phrase hasn’t even appeared on the internet before.

“It’s relatively rare for an agency to make up a term out of whole cloth and try to insert it into the law,” said Hecht.

Wagner said she was “very, very confused” by that and other phrases in the law. Even though the rule is explicitly about “research data,” the rule does not define that term, she said.

She worried that the rule was drafted ambiguously on purpose. “A sinister answer is that the ambiguity gives litigants more points to hold the agency up in court. Every single term is an attachment point,” she said, meaning that a company suing the EPA can seize on the new phrase and attempt to get a court to define it.

Other aspects of the rule “seem to me to be efforts to allow rich stakeholders to ‘data bomb’ the agency,” she said. They seemed designed to force the agency to surrender old data, she said, so that the fossil-fuel and chemical industry can run endless studies reanalyzing it, tweaking their models each time until they get the answers they want.

Just about everyone involved in the rule-making process agrees that the rule targets a specific and foundational piece of environmental science: the “Six Cities” study, from the Harvard School of Public Health. First published in 1993, the study found that Americans living in more air-polluted cities died earlier than Americans living in cleaner ones.

The killer was a specific type of air pollution: fine particulate matter smaller than 2.5 microns, which scientists call PM<sub>2.5</sub>. Subsequent studies of human anatomy and biochemistry have backed up this finding: PM<sub>2.5</sub> appears to be so tiny that it can seep through the lungs and enter the bloodstream, where it weakens and inflames heart tissue, injures organ walls, and damages cell structures.

PM<sub>2.5</sub>, in other words, appears to be exceedingly deadly. This makes it exceedingly expensive.

Every time the EPA adopts a new air or water rule, it must run a cost-benefit analysis, proving that the new rule’s benefits to the public exceed its costs. Each time an American dies earlier than they otherwise would have, the EPA says their death costs the U.S. economy about \$9.2 million. Since PM<sub>2.5</sub> kills hundreds of thousands of Americans every year, the costs of all these early deaths can quickly become overwhelming. The EPA has justified many air-pollution rules—including the Clean Power Plan, President Obama’s landmark climate-change rule for the power sector—on the basis of the high cost of PM<sub>2.5</sub>.

But it all comes back to the Six Cities study, say anti-regulation activists. While conducting the research in the 1970s and 1980s, Harvard scientists drew on hundreds of confidential medical records. These scientists say they cannot now release the underlying data to the public because doing so—even on an anonymized basis—would reveal the identity of individual patients.

But Harvard has turned over its data to third-parties and industry groups multiple times in the past. Each time, those scientists have reanalyzed the data and largely validated the results of the Six Cities study.

This isn’t enough for Steven Milloy, a policy adviser at the Heartland Institute and a former coal executive. “If you have data that’s really important for public health, then you ought to be willing to share it,” he told me. “PM is the granddaddy of all this stuff. It’s where the secret science came from.”

He argues that the EPA must release the data from the Six Cities study, even though that data is controlled by Harvard University. Milloy has long fought for the HONEST Act, a law by Lamar Smith, a Republican congressman of Texas, that closely resembles the new rule.

“It’s the biggest science fraud that has gone on in this country’s history,” he said of the Six Cities study and the larger effort to regulate PM<sub>2.5</sub>.

He contests that PM<sub>2.5</sub> is not toxic at all. “I have challenged EPA for years and they have never produced a body,” he said. “They’ve never been able to do that, not in China, not in India, not in the United States, not anywhere. China, for the last few years, has had these huge episodes of PM<sub>2.5</sub>. No one’s died.”

The World Health Organization has found that ambient outdoor air pollution, including PM<sub>2.5</sub>, killed 23 million people in China in 2012.

Milloy said that the new rule was “actually better than what I thought was coming.”

"If it's actually implemented, it's going to be revolutionary for EPA science and regulatory science, period," he said. The new rule would force the agency to reshape rules on radiation, drinking water, pesticides, and air-quality issues, because much of the evidence supporting those rules is drawn from medical research using confidential patient data.

But first the rule must stand up in court. It's unclear how it will fare. On the one hand, the rule is inexactly written and disinterested in citing legal authority.

The rule also directly contradicts a 2002 ruling from the D.C. Circuit Court of Appeals. "We agree with EPA that requiring agencies to obtain and publicize the data underlying all studies on which they rely 'would be impractical and unnecessary,'" the court decided in that case.

But the federal judiciary is being remade by the Trump administration. President Trump appointed 12 new appellate court judges in 2017, a record for a president's first year in office. These new, more conservative judges might find themselves more amenable to anti-regulatory arguments than their predecessors would have been.

It's possible that the rule, in any form, could outlast the EPA chief who signed it. Pruitt now faces the worst crisis of his 20-year political career: To describe him as scandal-plagued would be an understatement. He has set off a scandal pandemic. This weekend, The New York Times revealed that Pruitt personally met with a top energy lobbyist last year, even as Pruitt rented a \$50-a-night condo from the lobbyist's wife. This follows revelations into alleged ethics lapses over staff pay, luxurious travel arrangements, and grift among his subordinates.

There are at least 10 different federal investigations into Pruitt's ethics scandals, including ones led by the White House and the Republican-led House Oversight Committee. Pruitt will testify before two House committees on Thursday.